Supreme Court, U.S.
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No. 95-1960

In The

# Supreme Court of the United States

October Term, 1995

SPANG & COMPANY, *ET AL.*,

*Petitioners,*

v.

JEAN E. BRYTUS, *ET AL.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION

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## REPLY BRIEF IN SUPPORT OF PETITION

1. Respondents argue that this Court should not decide the question presented because petitioner did not raise it in the courts below, citing *Youakim v. Miller*, 425 U.S. 231 (1976), and *United States v. Mendenhall*, 446 U.S. 544 (1980). (Respondents' Brief in Opposition at 14-15) That argument is wrong because the question presented was actually considered and decided by the court below.

The cases cited by respondents stand for the proposition that, ordinarily, this Court will not decide a question that was not *decided* by the court below because it was not raised in the court below. Where the court below has *actually considered and decided the question*, however, this Court has long held that it is irrelevant how or when the question was raised:

> This is merely an application of the "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided."

*Orr v. Orr*, 440 U.S. 268, 274-275 (1979) (citations omitted).

In this case, the court below squarely considered and decided the question presented. The grant of summary judgment to respondents (which is the subject of the petition in this case) occupies a discrete section of the Opinion which is entirely focused on the question presented. (Pet. at 19a-21a) First the Opinion concludes that the collectively bargained pension agreements survived

their termination because they represented the "plan document":

> First, although the [1978] Pension Agreement did terminate in 1981, it was, at the time of termination, the sole governing plan document . . . Thus, the [1978 Pension] Agreement did survive its termination, in that it also constituted the sole controlling plan document. Thus, the Plan provisions for no reversion and for distribution in the event of termination survive the [1978 Pension] Agreement's termination.

(Pet. at 19a-20a) Then the Opinion concludes that the plan embodied in those expired collective bargaining agreements is unamendable:

> Spang's attempts to amend the Plan in November, 1981 [to reinstate the provision for reversion of surplus assets to the Employer], and June, 1988, must necessarily fail. In *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), the court found that an ERISA plan may not be amended unless the plan provides a specific procedure for amendment. Here, the Plan, as evidenced by the sole governing document [*i.e.*, the 1978 Pension Agreements], does not provide for amendment, and certainly not for unilateral amendment by Spang. Thus, any proposed amendments in 1981 and 1988 are invalid.

(Pet. at 20a)

Thus, the petition presents the very question considered and decided below, namely, whether an employee benefit plan which is embodied in a collective bargaining

agreement that does not provide for amendment is effectively unamendable after the collective bargaining agreement expires, under *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995). Accordingly, it is appropriately presented for this Court's review.

2. Respondents argue that the Court cannot decide the question presented without delving into "issues such as the 'vesting' of contract rights to pension surplus which turn on unique facts of each individual case." (Respondents' Brief in Opposition at 15) They argue that the decision below is premised on the alternative ground that they had contractually vested rights to the pension surplus, either under the 1978 Pension Agreements or under the Shutdown Agreement. (Respondents' Brief in Opposition at 15-23)

To dispose of that argument, it is necessary only to read the Opinion. In granting summary judgment to respondents, the Opinion says nothing about contractually vested rights under either the 1978 Pension Agreements or the Shutdown Agreement. (Pet. at 19a-21a) On the contrary, it recites that the motion is presented only under the 1978 Pension Agreements, not the Shutdown Agreement (Pet at 19a), and then proceeds to grant summary judgment to respondents based solely on the question of whether the pension plan embodied in the 1978 Pension Agreements can be amended after those agreements terminate. (Pet. at 20a)

Despite the protestations of respondents at this stage, and their new-found interest in a claim of contractually vested rights, it is easy to understand why the Opinion does not address any such question. As noted in the

petition, respondents' motion for summary judgment, by its terms, was premised on the 1978 Pension Agreements alone; it never mentioned the Shutdown Agreement. Moreover, respondents admitted on brief that they had no right to the surplus even under the 1978 Pension Agreements, which terminated in September 1981: "No participant had a right to the surplus increment in 1981." (Plaintiff-Participants' Response to Written Objections to United States Magistrate Judge's Report at 15)

Not only did respondents expressly disavow any claim of contractually vested rights, at oral argument in the Third Circuit they conceded the proposition that an inchoate interest in pension surplus under a pension agreement was *not* a contractually vested right (as set forth in the petition). After counsel for respondents brought up *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), which holds that a union has no authority to bargain away contractually vested rights of retirees, this exchange occurred, in which counsel readily conceded that an inchoate interest in pension surplus *could* be bargained away:

> COURT: Suppose there was, as a matter of a collective bargaining agreement, a provision that there be a pension plan and that the plan provide that the company could not obtain a reversion of excess contributions . . . and subsequently people did retire. And then, in further collective bargaining negotiations, the union and the company made an agreement that excess pension contributions could be reverted to the company . . . and the company then amended the plan in conformity with the second collective bargaining agreement. This would

> affect the benefits, presumably, of retirees, who might have been in the position, you know, to get a surplus. Could this be done?
>
> COUNSEL: I would think that, on a looking forward basis, a union could make an agreement to change reversion language, yes.
>
> COURT: But wouldn't that affect –
>
> COUNSEL: Oh, and that would affect at termination what people otherwise might have gotten. But I think the distinction –
>
> COURT: But it would also terminate people who had already retired and would not, you know, would not be represented by the union.
>
> COUNSEL: Right.

(Audio tape of oral argument, January 29, 1996) Given respondents' concessions, it is not surprising that the decision below does not address any issue of contractually vested rights.[1]

Accordingly, the Opinion delivers up the question presented in pure form, unmixed with any alternative claims. Of course, if the Court grants *certiorari* and reverses and remands the decision below, then respondents will be privileged to assert to the court below whatever alternative claims have not been waived. But

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[1] Tellingly, when respondents launched the lead case (*Brytus*), in which the retiree had died and was survived by his widow, the widow brought the case in her own right as a beneficiary under a pension plan. If respondents had been seeking to enforce a contractually vested right of the deceased retiree under the terminated collective bargaining agreements, the suit would have been brought by his estate.

the possibility that respondents may, on remand, offer alternative claims to sustain their summary judgment – arguments not yet considered or decided by the court below – does not stand in the way of consideration of the one important federal question that *was* actually considered and decided below.[2]

3. Respondents argue, finally, that the question presented is not important because employers can protect themselves against "unamendable plans" by negotiating amendment provisions in collective bargaining agreements. (Respondents' Brief in Opposition at 23-24) It is obviously of vital importance to employers, however, if they must now seek permission from their unions under ERISA to do that which Congress has authorized them to do unilaterally under the NLRA.

Whether employers could negotiate arrangements that would protect them against the absurdity of the decision below is not free from doubt, since the unions must always agree. In any event, the opportunity to negotiate over future collective bargaining agreements would offer no solution to previously terminated collective bargaining agreements, which, under the decision below,

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[2] For example, respondents also state, "This is not just an ERISA case. In addition to suing to enforce plan terms under ERISA, Participants brought a separate claim under LMRA § 301, 29 U.S.C. § 185." (Respondents' Brief in Opposition at 16) True enough. But the Opinion makes clear on its face that no such claim was considered or decided. (Pet. at 19a-21a) Indeed, in its subsequent opinion with regard to remedy, the court below specifically observed that its decision on liability was premised entirely on ERISA. (Pet. at 46a)

may haunt an employer in perpetuity. Ultimately, however, the point is that Congress never intended that employers be put in a position where the correct result can only be achieved by negotiation.

As set out in the petition, the decision below quite unnecessarily creates a major conflict between ERISA and the NLRA. It goes on to resolve the conflict by trampling decades of settled law under the NLRA as to an employer's right to alter the terms and conditions of employment after a collective bargaining agreement terminates. In so doing, it violates Congress's express direction that ERISA *not* be construed to alter or impair any other federal law. ERISA sec. 514(d), 29 U.S.C. § 1144(d). The importance of the case lies in giving effect to the express intent of Congress that ERISA and the NLRA peacefully coexist as a matter of law, as explained in the petition, without putting employers all over the country to the risk and uncertainty of private negotiations to achieve the sensible result that Congress believed it had already legislated.

Respectfully submitted,

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